UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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VICTOR ORTIZ, :

Plaintiff : 14-CV-7519(BMC)

-against- : United States Courthouse
Brooklyn, New York

ACACIA Network, Inc., :

Defendant. : June 19, 2015
11:30 a.m.

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TRANSCRIPT OF PRE-TRIAL CONFERENCE
BEFORE THE HONORABLE BRIAN M. COGAN
UNITED STATES DISTRICT JUDGE.

APPEARANCES:

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(Admission Pending)

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Proceedings recorded by mechanical stenography, transcript produced by computer-aided transcription.

THE CLERK: Ortiz versus ACACIA Network, Inc., et al. Docket number 14-CV-7519.

Counsel, please state your appearances starting with the plaintiff.

MR. NOHAVICKA: For the plaintiff, your Honor, Joseph Nohavicka, to my left, Peter Hatzipetros who was admitted just this morning, Ashley Serrano, admission pending. Good morning, your Honor.

MS. O'SULLIVAN: Good morning. Cara O'Sullivan of Kaufman Borgeest & Ryan for defendants.

THE COURT: Good morning.

Okay. This is the final pretrial conference in the case. There are just a few exhibits we need to go through.

Mr. Nohavicka, Exhibit 2, it is not all that helpful to say "all correspondence." Generally, some of it may be admissible and some of it may not be admissible and I can't tell which is which.

MR. NOHAVICKA: I'll try to straighten that out for you right now, your Honor.

THE COURT: Off the record.

(Discussion off the record.)

THE COURT: Back on the record.

MR. NOHAVICKA: Your Honor, I'm sorry. It was just phrased awkwardly by me and I apologize.

THE COURT: That's okay. Now I understand.

MR. NOHAVICKA: So it's just the e-mail and the only reason that's being introduced as evidence is to show that, that defendants did ask the plaintiff to perform more duties than his job description outlined.

THE COURT: What's wrong with that?

MS. O'SULLIVAN: Well, our contention is that this, this -- we don't dispute that we asked him to do driving and this does not bear on his claims for whether or not he was paid wages and it does not bear any relevance to the claim that he complained about not being paid, with the retaliation claim that he complained about not being paid his pages and was subsequently terminated from employment.

THE COURT: But this is off-hours driving, right? That's one of the things you are disputing. I take it the plaintiff is going to tie this and show when you offer the time records, well, here's something that doesn't fit the time records, therefore, we can't rely on the time records. I don't see anything wrong with that.

MS. O'SULLIVAN: Okay. Then we'll withdraw our objection.

THE COURT: Okay. So that can come in.

And then the damage computations, at the very least, I think the plaintiff has the right to put up some kind of chart in closing argument that is derived from his testimony saying what he is owed. Whether the jury gets to take back with them into the jury room, this Exhibit 10, that's another question.

It is potentially admissible as a summary, I guess. Right? There's a whole bunch of records from which this is derived and I don't think there's any dispute about the accuracy or at least there's a dispute about the accuracy but there is no dispute that there will be evidence to support each of the line items in this Exhibit 10, even if that evidence is the plaintiff's testimony.

MR. NOHAVICKA: May I address that, your Honor?

THE COURT: Yes.

MR. NOHAVICKA: That's exactly correct, but one of the things I should clarify is that I believe that this is going to be a bench trial. The plaintiff does not want a jury on this case and defense counsel has indicated that she was going to go back to her client to determine whether or not. In that case, it certainly wouldn't be of any prejudice. It wouldn't confuse the Court.

THE COURT: Okay. Well, if it's a bench trial, then of course I'm going to see it.

MR. NOHAVICKA: Yes.

THE COURT: Has anyone demanded a jury trial?

MR. NOHAVICKA: I believe that there was a jury demand in the beginning with our complaint but I thought that we had put in the JTPO that we were not going to have a jury.

THE COURT: Okay. Let me look at that.

MR. NOHAVICKA: And that will be on page six, your Honor, of the JTPO.

THE COURT: But it says with a jury.

Well, what's the defendant's position on that? Do you want a jury or not? I mean, if it has been demanded on the complaint, then even the defendant has the right to rely on the complaint and I am happy to do it either way.

MS. O'SULLIVAN: I just found out just now about the plaintiff's request for a bench trial. Being the clients, who they are and my contact, I know they're going to want some input, so I just want to confer with them this afternoon and we'll be able to reply later today.

THE COURT: Let's talk about the assumption that it is a jury trial because her clients say no, although I think probably it's likely they say yes, but just in case so we don't have to do this again, let's talk about whether this exhibit can be seen by a jury.

Let me ask why this doesn't fall under I think it's Rule 10006. The proponent may use a calculation, summary chart or calculation to prove the content of voluminous writings, recordings or photographs that cannot be conveniently examined in court, but isn't it right that this chart comes from the plaintiff's testimony, not any written records?

MR. NOHAVICKA: That is correct, your Honor. Partially, though, part of the testimony would be supported by defense counsel's records. We're just saying that it's not inclusive of what we're claiming.

THE COURT: You need the plaintiff's testimony to get to this chart.

MR. NOHAVICKA: Yes, your Honor, we do.

THE COURT: And for that reason, it's not a voluminous writing, recording or photograph literally.

MS. O'SULLIVAN: Your Honor, if I may.

THE COURT: Yes.

MS. O'SULLIVAN: Also, if you look at the record, the chart in front of you, with the exception of, I believe, three dates, every -- that chart is just a start and finish with adding ten hours a week.

THE COURT: Right.

MS. O'SULLIVAN: And I don't think that -- and like you said, it's not a voluminous record and that is simply one sentence that the plaintiff can testify to if that is his testimony.

THE COURT: Well, I mean, I think he is going to be testifying to that. He's going to testify effectively here's how much I worked. He's going to give the numbers in here.

Hang on one second.

You know, even a bookkeeper would be able to take the stand and say based on plaintiff's testimony, I prepared this chart, here's how the numbers work out. On the other hand, as an exhibit, it really doesn't fall under the rule as an exhibit that can be admitted into evidence. I have no problem using it during closing arguments. I do think you might want to simplify it. I don't think you need a listing like this. You know, you could just have a formula. Okay? You put up a big placard in front of the jury that says, you know, 40 times ten times number of days equals and that's the number, but I think I'm going to sustain the objection to using it in this form if we have a jury.

MR. NOHAVICKA: Your Honor, just for a clarification, we can still use it -- assuming that it's a bench trial now, we can still use it just to demonstrate and to illustrate what the testimony was.

THE COURT: Yes.

MR. NOHAVICKA: Yes, your Honor.

THE COURT: I mean, you could pretty much stand up in front of a jury with, whoever it is, an easel and a marking pen and do the math that's on this exhibit. Say you heard the plaintiff testify to this, well, if you take this and you take this rate and you multiply it by this number of days, here's what you get, that's the number you should award. So I don't think you really need this but I think you really can't admit it in front of a jury anyway technically.

MR. NOHAVICKA: Understood, your Honor.

THE COURT: Unless I can think of some other reason because I think it's -- I mean, actually there's probably a much easier way to present this to the jury.

MR. NOHAVICKA: Understood.

THE COURT: So try to do that.

MR. NOHAVICKA: Yes, your Honor.

THE COURT: So that objection is sustained in a jury trial and in a bench trial, it just doesn't matter.

Next, with regard to defendant's exhibits, these to me, at least F and G and H, all of them really at least through J, all of the objected-to exhibits, F, G, H, I and J, they do seem to me to be fair rebuttal of the plaintiff's retaliation claim. To the extent plaintiff claims that he was improperly fired for exercising his rights, these documents would tend to show that he was fired for bad performance.

So, assuming that a foundation for them as business records can be laid, which I assume it can, what's wrong with those?

MR. NOHAVICKA: Your Honor, some of the e-mails involve people that we've never heard of, we don't know. They would not come in under the hearsay within hearsay exception under 805 and for that reason, because of the -- yes, it would come in as business records under 803(6), but the information contained on there, some of it would not come in under 805.

THE COURT: Okay. Well, let's go through them then. Let's start with Exhibit F.

Okay. The warning that was sent to your client, that comes in, right?

MR. NOHAVICKA: That comes in, Your Honor, yes.

THE COURT: And that's the first three pages. I guess it's all of Exhibit F, right?

MR. NOHAVICKA: Yes.

THE COURT: Exhibit F is in.

Exhibit G. Well, you don't question that the first page, the e-mail from your client, that that would come in?

MR. NOHAVICKA: Yes, that would come in as a party statement anyway, Your Honor.

THE COURT: And then what is the objection to the memorandum that's annexed to it?

I will ask the defendant's counsel. Why is this marked as one Exhibit G? Shouldn't the e-mail be one exhibit?

MS. O'SULLIVAN: Yes. Yes. I apologize. There must have been some error in my office's fault.

THE COURT: So you are going to renumber your exhibits?

MS. O'SULLIVAN: Yes.

THE COURT: And that would be separate?

MS. O'SULLIVAN: Yes.

THE COURT: But what's wrong with the memorandum?

MR. NOHAVICKA: Your Honor, if I could just save the Court some time on this one, I'm going to withdraw the objection to that.

THE COURT: Okay. Thank you.

Okay. Exhibit H. It seems to me H goes to the defendant's state of mind.

MR. NOHAVICKA: I agree with that, Your Honor. We'll withdraw the objection on that.

THE COURT: Okay. And I, what is the defendant introducing I for?

MS. O'SULLIVAN: With respect to I, Your Honor, is that the plaintiff, plaintiff's complaints, he had complaints concerning his title as a, whether or not it be a recreation aid or recreation coordinator, and then he has allegations as far as the -- he made complaints concerning he was not paid.

This is with respect to a union grievance and we want to introduce it for the fact that it was not that he was complaining about the wages that he earned or did not earn, but that he was complaining more about the title that he was in which was not a protected activity under the fairly stated conduct.

THE COURT: But this is the response. Is he putting it in the grievance? I don't think so.

MS. O'SULLIVAN: Well, what we're saying is that their would likely be testimony, then we'll use this as rebuttal because there's testimony previously with respect to his conversations with the union, and so in order to kind of grasp all the conversations that went on concerning complaints he made to the union, we wanted to have this.

THE COURT: If your purpose is to show that his grievance had certain limitations, it's the grievance, not your response that shows that. You know, I guess you can say the response, since it responds to the grievance, shows what the grievance had, but it's the grievance. It's not the response.

MS. O'SULLIVAN: In this response, it also discusses a meeting with Mr. Ortiz. So I would ask the Court that if we need to use this document to refresh the witness' recollection concerning any meetings, that it be available so we could use it for that purpose.

THE COURT: Well, you have an absolute right to use the sun, the moon and the stars to refresh the witness' recollection, but I don't think this document is admissible in evidence. Certainly you may use it in the fashion you have outlined.

Okay. And then, again, it seems to me it goes to the defendant's state of mind and their ground for firing him. I will, if you want me to, give an instruction to the jury that they're solely to take it for that purpose if you ask for it from me at the time.

MR. NOHAVICKA: Yes, Your Honor. I'll make note of that.

THE COURT: If you help me to remember it. So for that purpose, I think it's admissible.

MR. NOHAVICKA: Yes, Your Honor. Our objection is withdrawn on that.

THE COURT: Okay. Then the check summary, what is missing according to plaintiff for the check summary?

MR. NOHAVICKA: Your Honor, May 2013 is missing.

THE COURT: You're saying he got another check in May of 2013?

MR. NOHAVICKA: Yes.

MR. HATZIPETROS: I apologize, Your Honor.

THE COURT: That's okay. You can talk.

MR. HATZIPETROS: The pay stubs that we proffered in evidence in exchange with discovery that were paid to our clients by the defendants, the numbers don't add up to the checks numbers and the numbers received in the compensation for double worked.

THE COURT: Was theirs more or less than yours?

MR. HATZIPETROS: Theirs are less than ours.

THE COURT: Isn't that good for you? I think this exhibit helps you.

MR. HATZIPETROS: Then the objection is withdrawn, Your Honor.

THE COURT: Oh, the audit report, oh, the jury is going to love to have a 250 page document of line items. What's missing from that? What could be missing from the payroll audit report?

MR. NOHAVICKA: Your Honor, it's more -- this is the first time we saw this was just recently so it's clearly a violation of 26(a) and should be subject to the sanctions of Federal Rules of Civil Procedure 37, 37(c). So, I mean, in addition, there's no 901 authentication at all. It's just an exhibit saying here we go and that's it.

THE COURT: Okay. Let me ask defense counsel.

What is this document.

MS. O'SULLIVAN: Sure. This is the document that, this is the document that reflects changes that were made to the time of Mr. Ortiz's time records. The defendants have not disputed that changes were made to his time records. That could have been due to him not punching in or punching out. We had to go in and change those times.

There was testimony that there were time sheets and that he didn't always hand in a time sheet and someone had to speak to him about what, what, when he left, when he came in, so we had to go back in and manually make changes to the time records and that's what this is. So, to the extent that this has any one day deletions, because the testimony is that Mr. Ortiz always punched in and punched out when he was there, and there is not any evidence in this for every change that is made that reflects what the plaintiff's testimony is.

THE COURT: You're saying, and the reason it's called an audit, is because it audits the changes; it comes up with an explanation for the changes.

MS. O'SULLIVAN: Not necessarily an explanation, but what the changes were and why the changes were made.

THE COURT: And why wasn't this produced either in the 26(a)(1)'s or in discovery?

MS. O'SULLIVAN: It was produced. It was produced at the end of discovery.

THE COURT: How close to the end?

MS. O'SULLIVAN: A couple of days before.

THE COURT: Okay. If you want to use it, what we will do is we will allow the plaintiff to take a deposition of a 30(b)(6) witness who is most familiar with this, how it was prepared, what's in it, and you will pay the plaintiffs three hours of attorneys' fees for that deposition and that can be done any time the parties agree before we try the case.

MR. NOHAVICKA: Well, Your Honor, may I be heard on that?

THE COURT: Sure.

MR. NOHAVICKA: And I appreciate that but we want no further delay on this.

THE COURT: There won't be any delay. Do it next week unless you want to try the case Monday.

MR. NOHAVICKA: I'd actually like to try the case. We were prepared for Monday, Your Honor.

THE COURT: The defendant may have another view about that, but, you know, we will pick the trial date. If it's Monday, you can take the deposition Saturday. Okay? If it's a week from Monday, you can take it next week, but we will accomplish both.

MR. NOHAVICKA: Yes, Your Honor.

THE COURT: It was produced during discovery. It should have been produced earlier, but the appropriate sanction is not preclusion. It's three hours of attorneys' fees so you can get to the bottom of it.

Okay. Now, the witnesses are all okay with everybody, right? No problems with witnesses?

MR. NOHAVICKA: No problems by the plaintiff, Your Honor.

THE COURT: Okay.

MS. O'SULLIVAN: I'm sorry, Your Honor. You're referring to any objections in the pretrial order?

THE COURT: Yes.

MS. O'SULLIVAN: We have no problems with it.

THE COURT: There's an overlap. It seems you are calling a lot of the same witnesses. And you are thinking two to three days, right?

MS. O'SULLIVAN: Yes.

MR. NOHAVICKA: The plaintiff, from opening arguments and for the direct testimony of two witnesses, that can be accomplished in one day.

THE COURT: Okay. Let's see when we can do this.

MS. O'SULLIVAN: Your Honor, if I may speak.

THE COURT: You have vacations?

MS. O'SULLIVAN: We had discussed last time we had an issue with a witness who was no longer an employee of defendants by the name of Lissette Rodriguez and what I have stated last time was that she was having surgery in May and would be available after June and obviously, and if we're looking at a July date, at that time, I brought it up because I did not know what was going to be the result of that surgery.

I have been, was trying to reach out to this witness last week and this week and I finally got an e-mail in the afternoon yesterday that she had surgery this past Friday, I don't know if it was a surgery date that had moved or there was complications of the prior surgery, but she had indicated that with additional treatment and follow-up for this major surgery, she would not be available until after August.

THE COURT: Wow.

MS. O'SULLIVAN: Yes. I understand that the Court would, wanted to try this case this summer. Our position is that the plaintiff wouldn't be prejudiced by a delay to early September to allow us to have this individual have live testimony.

MR. NOHAVICKA: Your Honor, may I be heard briefly on this?

THE COURT: Yes, I'm not ruling. I just have a question.

MR. NOHAVICKA: Yes.

THE COURT: You had the whole discovery period to take her deposition. One of the reasons for taking witness depositions is just so you don't find yourself in this position, right?

MS. O'SULLIVAN: Understood. And then we did take her deposition. Plaintiff took her deposition. I did ask some questions. We believe that her testimony, live testimony is very important to the case and we would appreciate an adjournment of the case in order that she appears as a witness.

MR. NOHAVICKA: May I just address that briefly, Your Honor?

THE COURT: Yes.

MR. NOHAVICKA: She is a key witness. She's actually my second witness. I don't need her live testimony. I have her deposition testimony. That will be read into the record and I will not ask for a negative inference charge, you know, assuming it goes before a jury. I will not ask Your Honor the circumstances of that, but we don't have to trouble her and bring her down for the trial in this case. The testimony will suffice.

THE COURT: But the defendant wants to trouble her. They want her live because they did what lawyers often make the mistake of doing at a non-party deposition which is they didn't ask many questions, right? They figured they could always get to her.

I think we are going to have to wait for her. When is she available?

MS. O'SULLIVAN: I just got the e-mail, I have the e-mails with me. I have no problems showing them to Your Honor in camera. She said after August is the time frame that she gave me. So if it could be September, that would be fantastic. I will get -- since she did have surgery last week, I will get in touch with her in an appropriate amount of time in order that I can inform counsel and the Court, if we do schedule a date today, if that is feasible or if there's any issues.

THE COURT: All right. I'm not going to decide the trial date now.

The first thing I want to know and I want to know it by Monday is if it's going to be a jury trial or a non-jury trial.

MR. NOHAVICKA: Just so you know, Your Honor, the plaintiff does not want a jury on this case.

THE COURT: Right. I got that. I am waiting to hear from the defendant on Monday as to whether this is going to be jury or non-jury.

And then I will decide whether we hold defendant to its choice of not having sufficiently examined Ms. Rodriguez at deposition or videotaped the deposition or something and then I will decide what to do about the schedule and I will let you know.

If we do try it this summer -- is there any other reason that the defendant has why we couldn't try it this summer?

MS. O'SULLIVAN: No, just with respect to Ms. Rodriguez.

THE COURT: Okay. Let me hear from you on Monday and then I will decide what I want to do.

Okay. Anything else we need to cover?

MR. NOHAVICKA: Nothing by the plaintiff, Your Honor.

MS. O'SULLIVAN: I apologize. I know I said with respect to the summer, there was not an issue. The only issue that I have as far as scheduling, and I do apologize, it's the week before Labor Day which this year happens to fall, like, the last day of August and the week before, the first week of

September, excuse me. My daughter's day care is closed that week and I typically take off.

THE COURT: Would she like to watch a trial?

MS. O'SULLIVAN: She's 15 months. So ...

THE COURT: I won't do it then.

MS. O'SULLIVAN: It would just be difficult for me to arrange child care. I would ask for that courtesy, please.

THE COURT: That's not a problem.

All right. You will let me know by Monday and then I will set a final schedule taking into account to the extent I think it's necessary Ms. Rodriguez and your daughter's school vacation.

Okay. Thank you all. Nice to see you.

MR. NOHAVICKA: Thank you, Your Honor.

MS. O'SULLIVAN: Thank you.

(Matter concluded.)

* * * * *

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

/s/ Charleane M. Heading — June 29, 2015

CHARLEANE M. HEADING — DATE